

1 I. NEEL CHATTERJEE (STATE BAR NO. 173985)
nchatterjee@orrick.com
2 MONTE M.F. COOPER (STATE BAR NO. 196746)
mcooper@orrick.com
3 THERESA A. SUTTON (STATE BAR NO. 211857)
tsutton@orrick.com
4 MORVARID METANAT (STATE BAR NO. 268228)
mmetanat@orrick.com
5 ORRICK, HERRINGTON & SUTCLIFFE LLP
1000 Marsh Road
6 Menlo Park, California 94025
Telephone: 650-614-7400
7 Facsimile: 650-614-7401

8 Attorneys for Plaintiff
FACEBOOK, INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

14 FACEBOOK, INC.,

15 Plaintiff,

16 v.

17 POWER VENTURES, INC., a Cayman Island
corporation; STEVE VACHANI, an individual;
18 DOE 1, d/b/a POWER.COM, DOES 2-25,
inclusive,

19 Defendants.
20

Case No. 5:08-cv-05780-JW

**REPLY MEMORANDUM IN SUPPORT
OF FACEBOOK'S MOTION TO
COMPEL THE PRODUCTION OF
DOCUMENTS AND DISCOVERY
RESPONSES FROM DEFENDANT
POWER VENTURES, INC.**

Date: October 24, 2011
Time: 9:00 a.m.
Judge: Hon. James Ware
Courtroom: 15, 18th Floor

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION 1

II. ARGUMENT 2

 A. Power’s Failure To Address Recent Third Party Productions Underscores
 The Deficiencies In Its Own Production 2

 B. Power Failed To Address Its Erroneous Reliance of Fed.R.Civ.P. 33(d) 4

 C. Power Has Not Already Produced All Of The Documents Facebook Seeks 5

 D. Facebook Has Shown How The Documents Are Relevant 8

 E. Facebook Did Not Waive Its Right To Move To Compel 9

III. CONCLUSION 11

TABLE OF AUTHORITIES**Page(s)****CASES**

<i>Byrnes v. Jetnet Corp.</i> , 111 F.R.D. 68 (M.D.N.C. 1986)	10
<i>F.D.I.C. v. Garner</i> , 126 F.3d 1138 (9th Cir. 1997).....	10
<i>Facebook, Inc. v. Maxbounty, Inc.</i> , 274 F.R.D. 279 (N.D. Cal. 2011)	2
<i>Financial Bldg. Consultants, Inc. v. Am. Druggists, Ins. Co.</i> , 91 F.R.D. 59 (N.D. Ga. 1981).....	8
<i>Gault v. Nabisco Biscuit Co.</i> , 184 F.R.D. 620 (D. Nev. 1999).....	10
<i>Govas v. Chalmers</i> , 965 F.2d 298 (7th Cir. 1992).....	5
<i>Kendrick v. Heckler</i> , 778 F.2d 253 (5th Cir. 1985).....	10, 11
<i>Multiven, Inc. v. Cisco Systems, Inc.</i> , 725 F. Supp. 2d	8, 9
<i>Oppenheimer Fund, Inc. v. Sanders</i> , 437 U.S. 340 (1978)	6
<i>Petroleum Ins. Agency, Inc. v. Hartford Accident & Indemn. Co.</i> , 106 F.R.D. 59 (1985)	10
<i>Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp.</i> , 711 F.2d 902 (9th Cir. 1983).....	4
<i>Riley v. United Air Lines, Inc.</i> , 32 F.R.D. 230 (S.D.N.Y. 1962)	11

STATUTES

Fed. R. Civ. P. 26(b)	7, 9
Fed. R. Civ. P. 26(b)(1).....	6
Fed. R. Civ. P. 33(d)(1).....	4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

OTHER AUTHORITIES

CAN-SPAM Act, the Computer Fraud and Abuse Act,
and California Penal Code § 502(c) 1, 6, 8, 9

7 James W. Moore, *Moore’s Federal Practice* § 34.02[5][b][i] (3d ed. 2011) 7

1 **I. INTRODUCTION**

2 Facebook's Motion to Compel the Production of Documents and Discovery Responses
3 from Defendant Power Ventures, Inc. should be granted for each of the following reasons:

- 4 1. Third party witnesses have now produced nearly 2400 pages of highly relevant
5 documents that Power has not produced, and which Power denies even exist;
- 6 2. Power has not produced a single document in response to Request Nos. 8, 21-28,
7 36, 40-41, 56, or 66, even though third parties have done so;
- 8 3. Power's responses to Interrogatory Nos. 1-3 and 13-15 improperly cite Rule 33(d)
9 without specification of documents, and leave Facebook to guess which production
10 documents Power claims are responsive to the interrogatories;
- 11 4. Power does not provide responsive information to Interrogatories Nos. 7 or 19,
12 even though each Interrogatory requests information crucial to Facebook's
13 remaining claims for violations of the CAN-SPAM Act, the Computer Fraud and
14 Abuse Act, and California Penal Code § 502(c).

15 Instead of addressing these critical problems with its discovery responses, Power, in a
16 cursory Opposition Brief, argues (a) that it already produced "the bulk" of everything Facebook
17 seeks through its production of source code, and via self-serving deposition testimony of co-
18 defendant Steve Vachani (Dkt. No. 149, at 1-3); (b) that the documents are "largely" irrelevant
19 because it contends the only information that matters in this case is that which it has cited in its
20 pending motion for summary judgment (*id.* at 4-5); and (c) that Facebook's motion is untimely,
21 and that it waived its right to compel production (*id.* at 6-7). Power's arguments are baseless.

22 The documents and information which should be produced are highly relevant. Power's
23 production of source code is incomplete, and in any event does not provide the information
24 sought through the motion to compel. Likewise, Vachani's self-serving testimony cannot
25 substitute for missing relevant documents. Because the motion to compel also is timely, the
26 Court should compel Power to produce documents responsive to Requests for Production Nos. 8,
27 21-28, 36, 40-41, 56, and 65-66, and also order Power to supplement its responses to
28 Interrogatories Nos. 1-3, 7, 13-15, and 19.

//

//

//

1 **II. ARGUMENT**

2 **A. Power's Failure To Address Recent Third Party Productions Underscores**
 3 **The Deficiencies In Its Own Production**

4 In its opening papers, Facebook highlighted the absurdity of Power's assertion that it has
 5 satisfied its discovery obligations by producing only 13 documents and source code in response to
 6 89 document requests, when two third-party witnesses produced in excess of 1,000 pages of
 7 highly relevant documents originally generated by Power.¹ See Dkt. No. 138, ("Mot.") at 11-12.
 8 In its Opposition, Power does not acknowledge these third party productions, deny they are
 9 relevant to Facebook's document requests, or explain why Power has not, itself, produced any of
 10 these materials. Power's silence concerning these problems, by itself, establishes that Facebook
 11 is entitled to relief.

12 First, the mere discrepancy between Power's production of 13 documents (totaling 90
 13 pages) and the production from third parties totaling 2400 pages, suggests that Power could not
 14 possibly have produced all of the responsive and relevant materials Facebook seeks. For
 15 instance, Interrogatory No. 1 asks Power to provide details regarding "the process by which [it]
 16 accesses [or] accessed" the Facebook website. Mot. at 8, 15. Such information clearly is relevant
 17 to Facebook's CAN-SPAM claims, since it seeks information about what efforts Power took to
 18 obtain user information from Facebook's own system in order to later send Facebook users
 19 commercial solicitations via electronic mail inviting them to join Power's own website. See
 20 *Facebook, Inc. v. Maxbounty, Inc.*, 274 F.R.D. 279, 283-84 (N.D. Cal. 2011) (noting that a third
 21 party's sending of messages to Facebook via use of Facebook's users' "walls," "news feeds," and
 22 other systems could be actionable under CAN-SPAM, since "these transmissions require at least
 23 some routing activity on part of Facebook"). Yet, citing Fed. R. Civ. P. 33(d), Power evasively
 24 responds by directing Facebook to Power's "business records including its June 2007

25 _____
 26 ¹ Since Facebook filed its Motion to Compel, it has received additional responsive materials from
 27 third parties. In total, these third parties have produced nearly 2,400 pages consisting of more
 28 than 500 documents. Power's own production does not include the overwhelming majority of
 these documents, though Vachani testified that Power never purged its files. Declaration of
 Morvarid Metanat in Support of Reply Memorandum re Motion to Compel ("Metanat Decl."),
 Ex. 30 at 142:11-143:10.

1 PowerScript Training document, and its PowerScript Documentation Developer manual.” *See*
 2 Mot. at 8 (quoting Power’s response to Interrogatory No. 1). This response is useless, as the two
 3 specific documents Power identifies do not discuss how Power actually accessed the Facebook
 4 website (or even mention Facebook at all). *See id.* at 10. Nor does Power make any effort to
 5 identify what other “business records” it is referring to. *Id.*

6 In contrast, **third-party witnesses** (all former Power employees) have produced hundreds
 7 of documents, such as a “Power Technology Overview,” a Power Script Documentation
 8 Developer manual that includes revisions not reflected in the copy produced by Power, and an
 9 email copying Mr. Vachani and other Power employees containing an evaluation of Facebook
 10 Connect, that provide information that is clearly responsive to Interrogatory No. 1 (not to mention
 11 other discovery requests). *See, e.g.,* Metanat Decl. Exs. 31-37. Not one of these documents has
 12 been independently produced by Power itself, and their recent production by the third parties
 13 belies Power’s assertion that Facebook has all of the documents it seeks. *See* Opp’n at 1-3.
 14 Indeed, their mere existence completely undermines Power’s argument set forth in other
 15 pleadings that such documents “simply do not exist.” Dkt. No. 136, at 1.

16 Nor does Power’s separate production of source code or its production of Mr. Vachani for
 17 a deposition alleviate its responsibility to search for and produce other responsive documents.
 18 For one thing, as of September 28, 2011, Power still has not produced all of the critical databases
 19 necessary for Facebook’s expert to understand and evaluate how Power used its software to
 20 access Facebook and to send Facebook users electronic mail messages, even though Facebook
 21 has repeatedly brought this deficiency to Power’s attention. *See* Metanat Decl. Exs. 38, 39. Nor
 22 could the source code possibly include all of the information sought by the Requests for
 23 Production or Interrogatories, because some of them seek information about **why** Power used
 24 certain technical mechanisms, such as new IP addresses, to access Facebook, not merely how
 25 Power employed such procedures. *See, e.g.,* Dkt. No. 140, Ex. 5 (Request Nos. 21, 24). Further,
 26 Power has never remotely attempted to supplement its Interrogatory Responses like Interrogatory
 27 No. 3 to specify which routines in the PowerScript software performed the actions specified in
 28 Facebook’s discovery requests. *See id.* Ex. 11 (quoting Power’s Response to Interrogatory No.

3). Mr. Vachani's deposition testimony cannot somehow satisfy Facebook's requests for such information, as Power suggests, because he admitted he was not a programmer, and had no personal knowledge of the how the PowerScript code actually functioned to send Facebook users the relevant solicitations to join Power. Metanat Decl. Ex. 30 at 12:24-13:15; 14:1-5; 182:16-186:6; 189:10-191:10; 195:3-197:13; 203:19-206:22; 209:11-15; 212:19-213:4; 254:2-15; 256:8-257:10; 257:22-267:22; 273:6-274:10.

Simply stated, Facebook has not received the documents and information it seeks and is entitled to receive. Given the ability of third parties to locate crucial missing documentation, Power has offered no valid excuse for why it should not be ordered to produce its own missing documents, or to provide the missing information from its Interrogatory responses.

B. Power Failed To Address Its Erroneous Reliance of Fed.R.Civ.P. 33(d)

Power also should be compelled to supplement its responses to Interrogatory Nos. 1-3 and 13-15 to the extent such responses evasively and improperly cite to Fed. R. Civ. P. 33(d). In its motion, Facebook pointed out that Power's citation to its unspecified business records does "not provide the information sought by the Interrogatories, and in fact offer[s] no details at all." Mot. at 16. *See also Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Inv. Corp.*, 711 F.2d 902, 906 (9th Cir. 1983) (generic references via former Rule 33(c) (now Rule 33(d)) to production of "partnership books of account, banking accounts, records, computer printouts, ledgers and other documents" was not a proper use of the option to produce business records).

In response, Power does not deny – or even address – its failure to comply with Rule 33(d). That fact alone establishes that Facebook is entitled to relief. *Rainbow Pioneer No. 44-18-04A*, 711 F.2d at 906. Moreover, the relatively vast production by four third-party witnesses underscores just how problematic Power's use of Rule 33(d) is. Nothing Power produced provides information responsive to Interrogatories Nos. 1-3 or 13-15, and Facebook is left to guess which "business records" Power is purporting to rely on. *See* Mot. at 16 (citing ²Cooper Decl. Exs. 3, 12-20). The Rule itself prohibits such generic citation. *See* Fed. R. Civ. P. 33(d)(1) (requiring the citation to business records to contain "sufficient detail to enable the interrogating

² References to "Cooper Decl." can be found at Docket No. 140.

1 party to locate and identify them as readily as the responding party could").

2 Importantly, given the disparity between Power's production and that of its former
3 employees, Facebook has no guarantee that it even has the correct business records from which to
4 obtain the complete responses to which it is entitled. This too reflects supplementation is
5 required. It is well-settled that the use of Rule 33(d) is improper when the answer cannot actually
6 be ascertained from the records offered, which clearly is the case here since third parties are
7 producing business records that supposedly do not even exist and are more informative than those
8 which Power has offered. *See, e.g., Govas v. Chalmers*, 965 F.2d 298, 302 (7th Cir. 1992)
9 (plaintiffs failed to label or organize nearly 9000 documents they jointly produced so as to
10 disclose which plaintiff had originally received documents, and because this information was
11 important to issues and not apparent from the face of the documents, plaintiffs had exclusive
12 access to information and could not rely on option to produce).

13 **C. Power Has Not Already Produced All Of The Documents Facebook Seeks**

14 Power also nonsensically argues that Facebook "already possess much of the information
15 is seeks in this motion to compel." Opp'n at 3. Yet, in its opening brief, Facebook identified
16 specific types of documents that Power failed to produce and described their relevance to
17 Facebook's claims. *See, e.g., Mot. at 13-14.* For instance, Facebook seeks an order compelling
18 production of "[i]nformation related to Power's access of Facebook's website, and use of IP
19 addresses and proxy servers." *Mot. at 13.* This information is critical to determining how and by
20 what means Power gained unauthorized access to the Facebook website, and how Power later
21 circumvented Facebook's technical measures implemented to block Power's access. Inasmuch as
22 this Court has ruled that "to the extent that Power circumvented Facebook's technical barriers,
23 Power may be held liable for violation of [California Penal Code] Section 502," there can be no
24 argument that the request seeks highly relevant information directly related to at least one of the
25 claims at issue. *See Dkt. No. 89, at 18.*

26 However, Power without explanation continues to refuse to provide such information,
27 even though it admits it documented the requested IP address information. *Mot. at 13 (citing*
28 *Cooper Decl. Ex. 1, at 107:4-12; 330:1-331:14).* Instead, Power re-characterizes Facebook's

1 requests as simply calling for “(a) technical means by which Power accessed Facebook’s website;
 2 [and] (b) technical information on Power’s proxy servers, including a list of exact IP addresses.”
 3 Opp’n at 1. Power then concludes that it has produced “the bulk” of information that Facebook
 4 seeks via its production of the 13 documents and source code. *Id.* Setting aside the obvious
 5 problem that the recent third party productions prove Power has not actually produced the “bulk”
 6 of its own responsive documents or information, Power does not explain why it does not need to
 7 produce any other responsive materials that explain precisely how and when it used proxy servers
 8 to change its website’s IP addresses to avoid Facebook’s efforts to block Power’s access of
 9 Facebook’s own website. To the extent relevant documents exist, Power must produce them.
 10 Fed. R. Civ. P. 26(b)(1). It may not unilaterally self-select responsive documents and withhold
 11 the rest. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (the concept of
 12 relevance is to be construed broadly to encompass any matter that bears on, or reasonably could
 13 lead to other matters that bear on, any issue that is or may be in the case).

14 Power’s related argument that it already produced its source code and that the code shows
 15 “precisely how Power accessed Facebook’s website” also fails to provide a defense to its non-
 16 production of other relevant information. Opp’n at 1-2. As noted, although Power has produced
 17 some code, it refuses to produce critical evidence contained in one or more code databases,
 18 despite this Court’s August 2011 Order requiring such production (Dkt. No. 127), and Facebook’s
 19 repeated requests for such documentation and information. Metanat Decl. Exs. 38-39. Indeed,
 20 Power is withholding, at least, (1) the Power database used in conjunction with Power’s access of
 21 the Facebook website and spamming of its users; and (2) the missing Power database with the
 22 local developer’s name “Power” that also was used in conjunction with these activities. *Id.*
 23 Without access to these databases, therefore, Facebook is being deprived of its ability to fully
 24 analyze how Power accessed the Facebook website, sent solicitations to Facebook users to join
 25 Power, and circumvented Facebook’s security measures – all central issues in this case and
 26 relevant to its remaining CAN-SPAM, CFAA and Penal Code § 502(c) claims. *See Cooper Decl.*
 27 Ex. 5 at Nos. 8, 21-28, 65-66; Ex. 10 at Nos. 1-3, 7. These missing components also are relevant
 28 to Power’s responses to Interrogatories Nos. 7 and 19, which seek information on the technical

1 process Power implemented to access Facebook and avoid Facebook's blocks, as well as and save
 2 Facebook user data on Power's servers. Cooper Decl. Ex. 10. None of this information has been
 3 offered to Facebook to date, despite its importance and clear relevance.

4 Power also incorrectly argues that Facebook "has uncontroverted evidence that Power
 5 accessed its website through proxy servers" and, thus, it is "unnecessary for Power to produce
 6 additional technical information, such as a list of its IP addresses." Opp'n at 2. Tellingly, Power
 7 does not argue that the information is irrelevant. In fact, Power merely admits that it used proxy
 8 servers to access Facebook after Facebook blocked it from further connection to the Facebook
 9 website, but does clarify when or how it actually used them to circumvent Facebook's block –
 10 presumably because such information undermines its arguments. *See id.* How Power used its
 11 proxies, what IP addresses it used as part of this practice, and when it used them, is the
 12 information that Facebook is seeking – not just confirmation that Power employed proxy servers.
 13 Facebook is entitled to all relevant evidence, not just the subset Power unilaterally decided to
 14 provide. Fed. R. Civ. P. 26(b).

15 Finally, Power also argues that Facebook has not explained why it is entitled to financial
 16 or advertising information as requested by Request for Production Nos. 40, 41 and 56. Opp'n at
 17 3. To the contrary, in its opening papers Facebook described precisely how financial data
 18 regarding Power's advertisements will establish how Power has been unjustly enriched and,
 19 further, how Power's financial condition is relevant to the calculation of punitive damages. Mot.
 20 at 13-14; Cooper Decl. Exs. 5 at Nos. 40-41, and 6 at No. 56. In response, Power claims only that
 21 Vachani's testimony on these subjects was enough to satisfy its production obligations (Opp'n at
 22 2), and that Facebook has no evidence of damages. Opp'n at 5. The revenue documents
 23 Facebook seeks are the best evidence of both issues, and "Rule 34 has long permitted a party to
 24 obtain documents or other intangible things from another party without taking a deposition." 7
 25 James W. Moore, *Moore's Federal Practice* § 34.02[5][b][i] (3d ed. 2011). *See also* Mot. at 13-
 26 14. Facebook should not be required to rely on Vachani's self-serving testimony. It is entitled to
 27 view the raw evidence that supports its damages arguments. Fed. R. Civ. P. 26(b).

1 **D. Facebook Has Shown How The Documents Are Relevant**

2 Power separately argues that it should not be compelled to produce additional materials
3 because the information sought is “largely” irrelevant, ostensibly because Facebook dismissed
4 some of its claims. Opp’n at 4, fn 2. As already noted, the requests and interrogatories for which
5 Facebook seeks production all relate to the remaining CAN-SPAM, CFAA and Penal Code §
6 502(c) claims, and not those that have been dismissed. Thus, all of the information sought is
7 highly relevant. Mot. at 13-14.

8 Power also self-servingly and incorrectly argues that the documents sought are not related
9 to Facebook’s CAN-SPAM claim, because Power argues that Facebook, rather than Power,
10 initiated Event invitations that resulted in commercial solicitations of Facebook users to join
11 Power. Opp’n at 4. It is enough to note that Power’s own arguments as to what the evidence
12 shows is hardly a legitimate basis to deny production of relevant documents. *Cf. Financial Bldg.*
13 *Consultants, Inc. v. Am. Druggists, Ins. Co.*, 91 F.R.D. 59, 61 (N.D. Ga. 1981) (“what is relevant
14 during pretrial discovery and what is admissible during trial are two different things, the former
15 being broader than the latter”). In fact, **how** Power accessed the site is relevant to Facebook’s
16 ability to establish who actually initiated the Facebook Events causing emails to be sent to
17 Facebook’s users to invite them to join Power. Mot. at 13. Rather than produce the best evidence
18 of how Power’s website operated, Power points to defendant Vachani’s self-serving testimony
19 about how the site worked. Opp’n at 2, 5. In fact, Vachani admitted in his deposition that he is
20 not competent to testify about the technical operations of the Power website. *See Metanat Decl.*
21 *Ex. 30 at 12:24-13:15; 14:1-5; 182:16-186:6; 189:10-191:10; 195:3-197:13; 203:19-206:22;*
22 *209:11-15; 212:19-213:4; 254:2-15; 256:8-257:10; 257:22-267:22; 273:6-274:10.* Facebook
23 should not be limited to Vachani’s testimony to prove its CAN-SPAM claim.

24 Power further argues that the information sought also does not support Facebook’s CFAA
25 claim, because the CFAA requires an intent to defraud. Opp’n at 4. Under the CFAA, fraud
26 “simply means wrongdoing and does not require proof of common law fraud.” *Multiven, Inc. v.*
27 *Cisco Systems, Inc.*, 725 F. Supp. 2d at 892 (citing *Hanger Prosthetics & Orthotics, Inc. v.*
28 *Capstone Orthopedic, Inc.*, 556 F.Supp.2d 1122, 1131 (E.D.Cal. 2008)). Power’s actions

1 demonstrate a culpable state of mind, as it knew its conduct was “wrongful.” *Multiven*, 725
 2 F.Supp.2d at 892. Dkt. No 54. ¶¶ 29-30; Cooper Decl. Ex. 1 at 274:13-275:16; 276:7-13; 279:16-
 3 280:24. Thus, evidence of Power’s efforts to circumvent Facebook’s security measures is directly
 4 relevant to its CFAA claim. Cooper Decl. Ex. 5 at Nos. 8, 21-28, 65-66; Ex. 10 at Nos. 1-3, 7.
 5 That is precisely the information that Facebook seeks in the requests subject to this motion.

6 For this same reason, the information Facebook seeks to support its CFAA claim also
 7 supports the Section 502(c) claim. Namely, Power accessed Facebook user information without
 8 permission. Mot. at 13. In an effort to avoid that fact, Power selectively quotes this Court’s
 9 July 20, 2010 Order to suggest the Court already has found that Power had not acted “without
 10 permission.” Opp’n at 5. In fact, the Court found that “accessing or using a computer, computer
 11 network, or website in a manner that overcomes technical or code-based barriers is ‘without
 12 permission’ and may subject a user to liability under Section 502.” Dkt. No. 89 at 18:15-17. As
 13 noted, this information is precisely the type of responsive information Power is refusing to
 14 produce. For example, Requests 22- 24 call for information related to Power’s access to the
 15 Facebook website after Facebook implemented technical measures to block such access. Cooper
 16 Decl. Ex. 5. Interrogatory No. 7 seeks similar information, calling for a description of the process
 17 by which Power continued to access the Facebook website following Facebook’s IP blocking
 18 measures. Cooper Decl. Ex. 10. Power’s acknowledgement of its use of proxies is insufficient,
 19 as it does not explain why or when they changed IP addresses *after* they became aware they had
 20 been blocked by Facebook. Power must be compelled to provide all relevant data concerning
 21 how it accessed Facebook after Facebook blocked Power. Fed. R. Civ. P. 26(b).

22 **E. Facebook Did Not Waive Its Right To Move To Compel**

23 Power half-heartedly argues that Facebook waived its right to seek an order compelling
 24 production and supplemental interrogatory responses, because its motion supposedly is untimely.
 25 Opp’n at 6-7. This argument also is frivolous.

26 //

27 //

28 //

Power does not deny that Facebook moved to compel less than two months after it deposited Vachani on July 20, 2011.³ As Facebook previously noted, because it had been repeatedly told before July 20 that all responsive documents to both its first and second sets of Requests for Production had been produced, Facebook could not know that others did, in fact, exist until Vachani's testimony proved that Power had not been diligent in searching for responsive information. See Mot. (Dkt. No. 129) at 5 n.1 & 9-11. Clearly, a motion to compel brought within two months of when the party first learned of the facts proving that earlier discovery responses were incomplete and inadequate is "timely." See *Petroleum Ins. Agency, Inc. v. Hartford Accident & Indemn. Co.*, 106 F.R.D. 59, 63 (1985) (no waiver of objection to nonproduction of documents when party seeking them was unaware of their existence; counsel is entitled to rely upon the prior representations of counsel that all responsive documents were being produced); *F.D.I.C. v. Garner*, 126 F.3d 1138, 1146 (9th Cir. 1997) (motion to compel brought two years after FDIC served administrative subpoenas seeking information from defendants was not untimely, in part because appellants failed to cooperate and ignored all requests to comply with the subpoenas).

Moreover, at the time Facebook moved to compel, the deadline for completing discovery in this case was **November 28, 2011**. Dkt. No. 116. That deadline has now been further extended to January 20, 2012. Dkt. No. 142. That means, pursuant to Civ. L.R. 37-3, the present motion would be timely even if it were brought on January 27, 2012, nearly five months after its actual filing date. As other courts have recognized, "A motion to compel filed during the discovery period would rarely be considered untimely." *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999). See also *Kendrick v. Heckler*, 778 F.2d 253, 258 (5th Cir. 1985) (motion to compel that was "filed within the discovery cut-off fixed by the district court" was not untimely); *Byrnes v. Jetnet Corp.*, 111 F.R.D. 68, 70-71 (M.D.N.C. 1986) (same). Indeed, the fact that Facebook's motion to compel is brought months before the close of discovery is what //

³ Power also ignores that at least some of the discovery subject to Facebook's motion (*i.e.*, its Second Set of Requests for Production, Nos. 51-89) was served on June 3, 2011.

distinguishes this case from virtually all of the situations discussed in Power's own cited authority, where waivers were held to have occurred. See Opp'n at 6-7 (citing cases).

Finally, Facebook did not unjustifiably wait months after receiving Power's responses to move to compel, as Power argues. See Opp'n at 7. Power did not even produce any documents responsive to Facebook's First Set of Document Requests and First Set of Interrogatories until February 3, 2011, because it insisted that the Court first needed to enter a Protective Order. Metanat Decl. Ex. 40 (*See* Response No. 3) After February 3, the parties engaged in extensive discussions about document production in which Facebook was assured as late as May 31, 2011 that "no documents other than raw source code were withheld." Metanat Decl. Ex. 41. Power then served responses to Facebook's Second Set of Document Requests on July 5, 2004. Metanat Decl. Exs. 42, 43. To date, Power has failed to produce any documents in response to these requests. Given that Power and its counsel represented for months that they had made a diligent search for documents, only to have Vachani reveal at his deposition that was not the case, there was no unwarranted delay by Facebook in seeking relief. A motion to compel is not untimely when its filing has been delayed by earlier good faith efforts to secure the information through negotiations, or from other sources such as depositions. *Kendrick*, 778 F.2d at 258; *Riley v. United Air Lines, Inc.*, 32 F.R.D. 230, 232-33 (S.D.N.Y. 1962). Facebook's motion is timely as a matter of law.

III. CONCLUSION

For the foregoing reasons, and those set forth in its opening papers, Facebook requests that the Court grant its Motion to Compel and order Power to produce documents in response to Requests for Production Nos. 8, 21, 22, 23, 24, 25, 26, 27, 28, 36, 40, 41, 56, 65, & 66 and supplement its responses to Interrogatory Nos. 1, 2, 3, 7, 13, 14, 15, and 19.

Dated: September 28, 2011

Orrick, Herrington & Sutcliffe LLP

By: /s/ Monte M.F. Cooper

MONTE M.F. COOPER
Attorneys for Plaintiff
FACEBOOK, INC.